IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	NO. 56441-2-I
	)	
Respondent,	)	DIVISION ONE
	)	
v.	)	
	)	
MICHAEL CHARLES WARNER,	)	Unpublished Opinion
	)	
Appellant.	)	FILED: September 11, 2006
	)	

COLEMAN, J.—Michael Warner appeals his robbery conviction on the ground that evidence was illegally seized from him during a police investigation and should have been suppressed. We conclude that the officer reasonably believed Warner might be armed and dangerous and had the authority to frisk to ensure officer safety, thus affirming the judgment and sentence.

FACTS

In June 2004, a bank robbery occurred at First Security Bank in Everett. The robber gave a demand note to a bank teller indicating he was armed, but no weapons were ever seen or used in the robbery. Witnesses at the bank described the suspect

as a white male in his 50s, approximately 5'10", wearing a dark shirt or coat and dark pants, glasses, and a fake gray wig and bushy moustache. The robber received some money from the teller, and then left the bank on foot. The Everett Police Department was notified of the robbery, and numerous officers arrived in the area.

Officer Jared Seth went to a restaurant near the bank to notify the employees of the robbery and ask them to call police if they saw anyone who matched the robber's general description or who appeared suspicious. Several minutes later, Seth was notified that a waitress had a customer who generally matched the robber's physical description, had arrived shortly after the time of the robbery, and acted uninterested when she told him about the robbery. The customer, Warner, was wearing dark pants and a white windbreaker and had a shaved head and was clean-shaven.

Seth approached Warner at the restaurant booth he was sitting in and identified himself. Seth asked Warner to place his hands on top of the table, and Warner complied. Seth explained that Warner matched the robber's description and that the waitress thought he responded strangely when told about the robbery. Warner denied being told about the robbery. Seth asked for Warner's identification, and Warner handed him his Oregon driver's license. The picture on the license showed Warner with a bushy moustache similar to the robber's description. Warner said he was in the process of moving from Oregon, and that he was at the restaurant for breakfast before meeting with his landlord. Warner also stated that he had driven to the restaurant that morning. Seth asked where his car was parked, and Warner described a location behind a building to the west of the restaurant. Seth thought it was strange that Warner would have parked so far away

from the restaurant because there were many open spots in the restaurant's parking lot.

Officer James Pulley arrived at the restaurant, and Seth decided to pat down Warner at this point. Seth conducted a brief pat down for weapons while Warner remained seated, patting Warner's coat, waistline, and legs. Seth did not feel anything that felt like a weapon. Pulley left the scene as Officer Ann Bakke arrived. Bakke noticed that when Warner saw her arrive, his eyes teared up. At this point, Seth and Bakke decided to handcuff Warner to prevent him from escaping. Seth also read Warner his Miranda[1] rights, and Warner invoked his right to silence by saying he did not want to answer any questions about the robbery. Seth and Bakke remained with Warner, occasionally updating him on the investigation. Warner did not ask any questions about the investigation, but occasionally made unprovoked comments to the officers. Warner commented on O. J. Simpson and asked whether the officers thought Simpson was guilty. The officers thought these comments were strange.

Officer Raymond Neibert brought a witness from the bank for a show up, but the witness was not sure if Warner was the robber because of the lack of disguise. Pulley located the car in the area Warner had described and looked in the car from the outside. He noticed a blue plaid shirt on the dashboard. The bank witness was brought to view this shirt and said that it might be the shirt worn by the bank robber. Neibert asked Warner if he would consent to a police search of his car, and Warner asked if there was a search warrant. Upon learning there was not a warrant, Warner

[1] Miranda v. Arizona, 384 U.S. 436, 865 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

declined to consent to a search.

After this point, Seth felt that Warner should be moved from the restaurant to prevent further disruption to the business. While Warner was outside near the patrol car, a second bank witness was brought to view Warner. This witness also could not make a positive identification, but said Warner looked very similar to the robber. Seth instructed Warner to sit in the back of the patrol car because there was nowhere else for him to sit.

Seth and Bakke were told by Neibert—about 40 minutes after Seth first approached Warner—that the information produced by the investigations was not sufficient to establish probable cause to arrest Warner and that they should release him. Seth and Bakke were both disappointed and surprised by this news because they thought Warner was a good suspect. Seth opened the rear door of his patrol car, where Warner was seated, and told him that he could get out of the car. As Warner bent his leg to get out of the car, Seth noticed a square bulge in Warner's pants pocket that he had not felt in his earlier pat down. Seth felt the outside of Warner's pocket to determine if the bulge was a weapon. Seth testified that it felt soft on the outside but dense inside. Seth asked Warner what was in his pocket, but Warner did not answer. Seth then reached into Warner's pocket and pulled out the item to discover it was a lump of currency bills folded into a square. Some of the serial numbers on the bills were compared to the serial numbers from the bait money given to the bank robber, and the numbers matched. Warner was then arrested for robbery.

Warner moved to suppress the evidence found in his pocket, contending that the search was unlawful. A CrR 3.6 hearing

was held and, after hearing testimony from police officers (Warner did not testify) and argument, the trial court denied Warner's motion. Warner proceeded by stipulated bench trial and was convicted as charged. He now appeals—not on the issue of the detention or the first frisk—but assigning error only to the second frisk Seth conducted as Warner was being released.

Analysis

Constitutionality of the Second Frisk

Warner argues that Seth's belief that Warner might be armed and presently dangerous was not objectively reasonable, and thus, the second frisk of Warner was unjustified under the Fourth Amendment and the Washington Constitution.

The United States Constitution guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . . ." U.S. Const. amend. IV. The Washington Constitution provides: "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." Wash. Const. art. I, § 7. Both constitutional provisions provide freedom only from unreasonable searches and seizures; thus, a search or seizure must be reasonable to be authorized under either constitution.[2] See State v. Baro, 55 Wn. App. 443, 777 P.2d

[2] Warner devotes a section in his brief to an analysis under State v. Gunwall, 106 Wn.2d 54, 61–62, 720 P.2d 808 (1986), to determine whether the Washington Constitution provides greater protection against this type of search and seizure than the Fourth Amendment. Analyzed under either constitutional provision, however, the question before us is one of the reasonableness of the officer's suspicion that the suspect is armed and dangerous. See State v. Kennedy, 107 Wn.2d 1, 6, 726 P.2d 445 (1986); Baro, 55 Wn. App. at 445. The standard of reasonableness is the same under the United States or Washington Constitution.

1086 (1989).

While probable cause is generally a prerequisite to a lawful search and seizure, there are narrowly drawn exceptions to this rule. Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968); State v. Broadnax, 98 Wn.2d 289, 654 P.2d 96 (1982). Under certain circumstances, a police officer is permitted to conduct a limited protective frisk for weapons as part of an investigative detention. Terry, 392 U.S. at 21–24; Baro, 55 Wn. App. at 445. The officer is permitted to conduct a protective frisk if the officer reasonably believes that the suspect could be armed and dangerous. Terry, 392 U.S. at 27; State v. Glossbrener, 146 Wn.2d 670, 680, 49 P.3d 128 (2002). The officer need not be absolutely certain that the suspect is armed; "the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger." Terry, 392 U.S. at 27. The officer must be able to be point to "specific and articulable facts" that create an objectively reasonable suspicion that the suspect is armed and dangerous. Terry, 392 U.S. at 21; see also State v. Kennedy, 107 Wn.2d 1, 6–7, 726 P.2d 445 (1986).

Warner's arguments on appeal focus only on Seth's second frisk, alleging that it was unreasonable for Seth to suspect he was armed and dangerous at the time of the second frisk. It is true that the first frisk had not revealed any weapons and that Warner had been compliant throughout the detention and made no furtive or threatening movements, but the square bulge in his pocket did give Seth reason to suspect that Warner was concealing a weapon. And while it is true that Warner was about to be released, nothing in the record suggests Warner knew he was about to be released. Even if he did know, an officer

may frisk for weapons if the officer reasonably suspects a releasee is armed. State v. McKenna, 91 Wn. App. 554, 562, 958 P.2d 1017 (1998). Seth was about to remove Warner's handcuffs, and if Warner had been armed, the officers' safety could have been jeopardized.

Warner relies on State v. Galbert, 70 Wn. App. 721, 855 P.2d 310 (1993), to argue that the second frisk was unreasonable because he had done nothing to indicate that he was armed and dangerous. In Galbert, police executed a search warrant in a house and found Galbert in the living room. An officer handcuffed Galbert and frisked him to ensure officer safety while they were searching the home. A second officer later performed another frisk to make sure that no weapons had been missed in the first search and to check for contraband. The Galbert court concluded that nothing in the record indicated that the first frisk had been insufficient and Galbert had done nothing to demonstrate that he was armed and dangerous. Thus, the court concluded that the second frisk was not authorized because the officer's safety concern was unreasonable. Galbert, 70 Wn. App. at 726.

Like Galbert, Warner was cooperative with police and did not make any furtive movements or threats, but the second frisk here was a result of Seth spotting the bulge in Warner's pocket. When Seth saw the bulge, his concerns for officer safety were reasonable and he was justified in performing a second frisk for weapons, especially in the context where the robbery suspect had claimed to be armed. Nothing in the course of investigation had dispelled the officers' initial suspicion that Warner was the robber—which resulted in a lawful investigatory detention not challenged here. Seeing the bulge was a specific fact articulated

by Seth to explain why he performed a second frisk, whereas no such specific fact was articulable in Galbert. We conclude that Seth's second frisk of Warner was justified by a reasonable suspicion that Warner was armed and dangerous.

Reasonableness of Seth's Search of the Pocket

Warner argues that Seth knew the bulge was paper—not concealing a weapon—as soon as he put his hand in Warner's pocket, and therefore, he should not have pulled the paper out of the pocket because he had no reasonable belief that it could be a weapon.

"If a protective search for weapons goes beyond what is necessary to determine if the suspect is armed, it is no longer valid under Terry and its fruits will be suppressed." Minnesota v. Dickerson, 508 U.S. 366, 373, 113 S. Ct. 2130, 124 L. Ed. 2d 334 (1993). In Dickerson, the Court concluded that a search was not justified because the officer had determined that the lump in the suspect's pocket was not a weapon, but manipulated the contents of the pocket to determine that the lump was crack cocaine. "[T]he officer's continued exploration of respondent's pocket after having concluded that it contained no weapon was unrelated to 'the sole justification of the search [under Terry:] . . . the protection of the police officer and others nearby[,]'" and was therefore not authorized. Dickerson, 508 U.S. at 378 (quoting Terry, 392 U.S. at 29).

Here, Seth did not determine that the bulge in Warner's pocket was not a weapon until after he had pulled the money out of the pocket. Seth testified that he was not expecting to find robbery

evidence in Warner's pocket because he assumed that any money stolen from the bank would be in a bag. When Seth frisked the outside of Warner's pants, he was not able to ascertain whether the bulge contained a weapon—although it was soft on the outside, there was a denser core that could have been a weapon such as a folding knife. Seth testified that when he felt paper in Warner's pocket, he was still concerned that the paper might be wrapped around a knife or small handgun. His fears for officer safety had not been eliminated simply by feeling paper. Because the frisk and touching of the item in Warner's pocket did not dispel Seth's concern that Warner could be armed and dangerous, we conclude that Seth was justified in removing the bulge due to a reasonable suspicion that Warner was concealing a weapon.

Authority to Conduct Second Frisk

Warner argues that Seth lacked the authority to frisk because Warner's release had been ordered. He also claims that because he was being released because probable cause had not been established, Seth's suspicions that Warner had participated in the bank robbery were irrelevant and should not have led to a second frisk.

It is true that once it has been announced that an arrestee is released, the arrestee "will have little motivation to use a weapon or destroy evidence, and the officer will have little need to conduct a full search of the person." McKenna, 91 Wn. App. at 562. But the McKenna court also states that an officer "may still pat for weapons if he or she reasonably suspects that the arrestee/releasee is armed." McKenna, 91 Wn. App. at 562.

The facts of McKenna are quite

different from the case here: an officer in McKenna had probable cause to make a noncustodial arrest of McKenna, but then she was released after an officer had finished writing citations. An officer offered McKenna a ride home and asked her to consent to a search of her bag for weapons as a safety precaution. After he discovered drug paraphernalia in her bag, he searched her pockets and found methamphetamine and subsequently arrested her. The court concluded the search of her pockets was an unauthorized search because it was not incident to an arrest because McKenna had already been released from her first arrest, and she was not under arrest for mere possession of drug paraphernalia (because it is not a crime). For purposes of riding in the patrol car, McKenna had consented only to a search of her bag, not her pockets. The search was therefore not justified as a search incident to arrest (because McKenna was not under arrest) or because of consent.

Here, Warner had never been arrested, and although the police had determined that there was not probable cause to continue detaining Warner, his release had not yet been effectuated. The officers did not testify that Warner had been told that he was about to be released, so it is unclear whether Warner would have had decreased motivation to use a weapon after he exited the car. And while the officers' authority to continue detaining Warner had expired, their suspicions that he committed the robbery were not dispelled. Seth still retained the authority—based on his initial authority (not challenged here) to detain Warner for investigation purposes—to ensure officer safety as he released Warner. McKenna states that upon reasonable suspicion of weapons, a person already released may be frisked—a situation where an officer has arguably less authority than here, where Warner

had not yet been released. We conclude that Seth did have the authority to perform a weapons frisk upon seeing a bulge in Warner's pocket because Warner's release had not been effectuated and it was reasonable to suspect that he was armed and dangerous.

For the foregoing reasons, we affirm.

Coleman, J.

WE CONCUR:

Ellington, J.

Agid, J.